JULY 2011 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

Injunctive relief is largely an equitable remedy, although governed by MCR 3.310. There are four main factors a court must consider: Whether (1) the moving party has made the required demonstration of irreparable harm, (2) the harm to the moving party absent the injunction outweighs the harm it would cause the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued. *Detroit Firefighters Association v Detroit*, 482 Mich 18, 34 (2008).

(1) Whether there has been a demonstration of irreparable harm.

This is the most significant factor. The harm must be particularized and must be real and imminent, not speculative. The harm must typically not be compensable by monetary damages.

No facts presented demonstrate irreparable harm to Betty's if the injunction does not issue. Betty's profits are low, the lowest of 200 stores. Even if those profits are lost, Betty's loss is determinable and compensable in money. Moreover, this low profit level has occurred even though the location might be considered desirable. If Betty's loses that location, locations may nevertheless be open. That Betty's cannot operate out of <u>that</u> location is not irreparable harm.

(2) Whether the harm to the moving party absent the injunction outweighs the harm it would cause the adverse party.

While some harm could come to Betty's by loss of the location, the greater harm is to Sam who will be forced to operate a Betty's when Sam does not want to do so. Sam may get a better deal from Handy's, a deal they would lose if the injunction were issued.

(3) Whether the moving party showed that it is likely to prevail on the merits.

At the crux of this matter, Betty's would have to show it has a legally enforceable contract to operate its location at Sam's property. However, the prior contract has expired. The new contract was never signed. Absent some other non-contractual theory, which the facts do not support, Betty's has nothing to enforce. Therefore, it is likely Betty's would lose, not win.

(4) Whether there will be harm to the public interest if an injunction is issued.

This is not a case directly affecting the public's interest. The public has been aware of the Betty's location for some time. That location would be replaced by a Handy's. The switch in business does not have a significant (or maybe even any) impact on the public interest.

Conclusion: Consideration of the factors for injunctive relief warrants the conclusion the injunction should not be issued. Betty's does not prevail on the most salient factor, demonstration of irreparable harm; and does not prevail on the weighing of the harm and likelihood of success on the merits factors. Lastly, the public interest is not affected and is thus a non-issue.

ANSWER TO QUESTION NO. 2

1. Validity of the proxy from Dan to Carolyn: Michigan law expressly permits shareholders to authorize other persons to act for them by proxy. MCL 450.1421(1). A proxy is generally only valid for 3 years, unless otherwise provided in the proxy. §1421(2). A proxy may be granted by means of "telegram, cablegram, or other means of electronic transmission." §1421(3)(b). If a proxy is granted in such a manner, it must "either set forth or be submitted with information from which it can be determined that the telegram, cablegram, or other electronic transmission was authorized by the shareholder." Additionally, if the electronic transmission is determined to be valid, the inspectors or persons making the validity determination must specify the information upon which they relied. The facts indicate that the e-mail was sent from Dan's personal e-mail, included the notice sent from the corporation to Dan, and specifically authorized Carolyn to vote for the resolution for Dan by proxy. Because the e-mail contains information from which it can be determined that the e-mail was authorized by Dan, his challenge to the validity of the proxy will most likely be unsuccessful.

2. Validity of the shareholder vote: Increasing the aggregate number of shares in a corporation is specifically contemplated as a basis upon which to amend the articles of incorporation under Michigan law. MCL 450.1602(d). The only issue to be determined is whether the proper procedures were followed regarding the amendment of the articles of incorporation.

MCL 450.1611(4) requires that notice be given to each shareholder of record entitled to vote "within the time and in the manner" provided for giving notice of shareholder meetings. MCL 450.1404(1) permits notice "not less than 10 nor more than 60 days" before the date of the shareholder meeting, and specifically permits notice to be given by electronic transmission. The 15-day notice provided to Dan by electronic transmission is sufficient under the statute. However, even if the notice given to shareholders was insufficient, Dan waived any deficiencies in the notice because he was present at the meeting by his authorized representative, holding his proxy. MCL 450.1404(4); *Foote v Greilick*, 166 Mich 636, 642 (1911).

The articles of incorporation are amended if supported by a majority of the outstanding shares entitled to vote. MCL 450.1611(5). This is higher than the general requirement for

shareholder approval, which is a majority of votes cast. MCL 450.1441(2). The voting requirements for amending the articles of incorporation may be subject to even greater requirements as prescribed by law or in the articles of incorporation. MCL 450.1611(5). Once the amendment is approved, a certificate of amendment must be filed with the state. MCL 450.1611(7); MCL 450.1631. Because the facts indicate that the amendment to the articles of incorporation was approved by 58% of the shares entitled to vote, and the appropriate certificate was filed with the state, the amendment to the articles of incorporation is valid.

3. Preemptive Rights: Shareholders in Michigan do not have *any* preemptive rights to acquire a corporation's unissued shares unless such a right is created by (1) the articles of incorporation or (2) an agreement between the corporation and 1 or more shareholders. MCL 450.1343(1). Here, the facts indicate that the articles of incorporation provide for preemptive rights.

If preemptive rights are created by a statement in the articles (or agreement) that the corporation "elects to have preemptive rights," or words of similar import, Michigan law lists several "principles" that apply to the preemptive rights unless otherwise provided. Included among the listed principles is that the shareholders' preemptive rights are "granted on uniform terms and conditions prescribed by the board to provide a fair and reasonable opportunity to exercise the right to acquire proportional amounts of the corporation's unissued shares upon the decision of the board to issue them." MCL 450.1343(2)(a). Here, because the facts indicate that the preemptive rights are mentioned in the articles of incorporation without additional provisions, the principles listed in the statute would be applicable. Thus, in order to challenged the terms established by the board, Dan would have to show that the terms and conditions were not uniform, or that Dan was not provided "a fair and reasonable opportunity" to exercise his right to acquire his share of Rippy stock.

The facts indicate that notice was sent to all shareholders, describing the terms and conditions for shareholders to exercise their preemptive rights. The terms and conditions described appear to be uniform -- all shareholders were offered the opportunity to purchase 5 shares for every share of Rippy stock currently held, for the price of $10 per share. Any unclaimed shares could be purchased by interested stockholders on a lottery basis for the same price. The only remaining question is whether the November 1, 2010 deadline denied Dan "a fair and reasonable opportunity" to purchase his share of Rippy stock. The facts indicate that the board of directors' notice to all stockholders of record was sent out on August 28, 2010, approximately two months prior to the

November 1, 2010 deadline. Without additional facts, it is unlikely that Dan will be able to show that giving him two months time to claim his preemptive rights denied him "a fair and reasonable opportunity."

ANSWER TO QUESTION NO. 3

Michigan recognizes a strict liability cause of action against dog owners for damages resulting from dog bites. If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. MCL 287.351.

Here, the facts indicate that Peter was out jogging on a sidewalk, presumably on public property. The facts do not indicate that Peter did anything to provoke the dog. In fact, Peter followed the officer's commands precisely and immediately stopped and put his hands up when ordered to do so. Peter was nonetheless bitten by the dog and suffered numerous injuries.

In a strict liability tort action, liability is not fault-based. It is not dependent, for example, on whether negligent, intentional, or accidental conduct caused the harm; rather, civil liability is imposed for the wrongful conduct irrespective of fault. *Tate v City of Grand Rapids*, 256 Mich App 656, 660 (2003). As such, in this case it would not matter that the officer was mistaken in his belief that Peter was the assailant.

Pursuant to this statute alone, the Police Department would be liable for Peter's injuries. However, Michigan's Governmental Tort Liability Act (GTLA), MCL 691.1407(1) provides in pertinent part:

"Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."

The statute grants broad immunity to governmental agencies, extending immunity "to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156 (2000) (emphasis in original). The police activity of investigating a felony certainly constitutes the exercise or discharge of a governmental function. None of the exceptions to immunity apply. Thus the city would be immune from suit. *Tate, supra*.

With respect to the liability of the police officer, an

officer or employee of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer or employee if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the score of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(2).

Here, the facts are clear that the officer was responding to a dispatch call in an attempt to apprehend a suspect of a felonious assault. The officer reasonably believed he was acting within the scope of his employment when he released his dog on the subject. "Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct, and the apprehension of wrongdoers. *The determination of what type of action to take, e.g., make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity.*" *Brown v Shavers*, 210 Mich App 272, 277 (1995) (emphasis in original).

The officer was clearly engaged in the exercise of a government function when he was attempting to apprehend the suspected criminal. Gross negligence is defined in MCL 691.1407(7) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." There is nothing in the facts that suggest that the police officer's actions rose to the level of gross negligence. Thus, there is no likelihood that Peter would be successful in his suit against the police officer.

ANSWER TO QUESTION NO. 4

This question implicates the ability of third-party beneficiaries to enforce a contract. The governing Michigan statute, MCL 600.1405, provides:

"Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

"(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

* * *

"(2)(b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime."

An intended beneficiary acquires a right under a contract by virtue of a promise. Restatement 2d, Contracts, §302(1).

The statute creates the status of third-party beneficiary to a contract. The statute provides protection to only those persons as to which the promisor undertakes an obligation directly or for that person or class or persons. *See Koenig v South Haven*, 460 Mich 667 (1999). The operative word in the statute to determine who holds the status of a beneficiary is "directly." The purpose of this statutory language is to assure that parties to a contract are clearly aware of the scope of their contractual undertaking in regard to third parties.

The statute creates rights only in third parties who are directly referred to in the contract. A third-party beneficiary may be specifically named in the contract or may be a member of a class, provided the class is sufficiently described to be reasonably identifiable. Such a class must be less than the world at large and cannot be designated by reference to the public at large. *Koenig, supra*.

The court will use an objective standard to determine from the contract itself whether the promisor undertook to give, to do, or refrain from doing something directly to, or for, the third-party

beneficiary. *See Koenig, supra,* at 680; *Guardian Depositors Corp v Brown,* 290 Mich 433, 437 (1939).

An incidental beneficiary is one who may be indirectly and only incidentally benefitted by the contract. Incidental beneficiaries are not covered by the statute and acquire no rights by virtue of a promise. Restatement 2d, Contracts §302(2). Therefore, a third person cannot maintain an action on a contract merely because he would receive a benefit from its performance or because he was injured by the promisor's breach of that contract. *See Greenlees v Owen Ames Kimball Co,* 340 Mich 670 (1974).

(a) Paul

In this instance, Paul was not identified in the contract by name nor was he a party to the contract. However, a class of persons, the tenants of the building, was specifically designated in the contract. Therefore, Quick Repair knowingly and expressly undertook an obligation directly for the benefit of the specific class of persons who were reasonably identified in the contract, the tenants. The language of the contract provides that Quick Repair will minimize any disruption to the tenants, including Paul. Quick Repair's promise in the contract comes within the third-party beneficiary statute, for it directly benefits the tenants who carry on operations in the building. Therefore, Paul was a member of the class that had been sufficiently described or designated in the contract, to wit, a tenant of the building. Paul therefore may proceed to maintain a breach of contract action under a third-party beneficiary theory to recover damages for the harm done to his furs and his loss of sales due to the business disruption.

(b) Victor

Victor vendor, however, is not a tenant of the building. Thus, as opposed to being a specifically designated person or a member of a reasonably identified class of persons who directly benefit from the contract, Victor is an indirect and incidental beneficiary of the contract. An incidental beneficiary has no rights under the contract. Victor cannot maintain an action against Quick Repair based on the contract between Larry Landlord and Quick Repair even though he suffered damages from Quick Repair's breach of the contract.

ANSWER TO QUESTION NO. 5

Several Michigan Rules of Professional Conduct (MRPC) come into play under this scenario.

Various rules prohibit the lawyers from altering the document. MRPC 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act." The electronic information at issue here (the electronic version of the document including metadata) clearly has evidentiary value.[1] Also, the court has resolved the question as to whether it is a "document" which must be turned over within the meaning of the plaintiff's discovery request. If a LawFirm lawyer alters the electronic version or responds to the discovery request without producing it, or assists in such activity, the question of MRPC 3.4(a)'s applicability depends upon whether this activity is unlawful. As the comment to MRPC 3.4 notes:

"Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information."

Violation of discovery rules or orders may also establish unlawfulness for purposes of MRPC 3.4(a).[2]

In additional to violating MRPC 3.4(a), the conduct proposed here could also constitute a violation of other sections of MRPC 3.4, such as MRPC 3.4(b), prohibiting the falsification of

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[1]See *DC Ethics Op* 341 (2007) ("Because it is impermissible to alter electronic documents that constitute tangible evidence, the removal of metadata [from a document requested in discovery] may, at least in some instances, be prohibited . . . [by DC Rule 3.4(a)].")

[2]See 2 G. Hazard, W. Hodes & P. Jarvis, *The Law of Lawyering*, §30--4 at 30--7-9 (3d ed). See also *Restatement (Third) of the Law Governing Lawyers* §118(2).

evidence.[3]

The withholding, destruction, or alteration of the electronic document by Partner or Associate would also constitute a violation of MRPC 3.4(c), which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Failure to produce discoverable evidence constitutes a violation of the Michigan Court Rules on discovery. It is clear from the facts that any such withholding of the document would be a knowing violation of the rule. Finally, it cannot be argued that this would be an open refusal based on an argument that there is no valid obligation to produce the document; the proposed action is surreptitious, not above-board. Also, although MRPC 3.4(c) does not specifically reference the violation of court orders, courts and discipline agencies consistently hold that knowing violation of an order constitutes a violation of this rule.[4]

Yet another provision of MRPC 3.4 would be violated if the CEO's plan were to be carried out. A Michigan lawyer shall not "fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party." MRPC 3.4(d).[5]

Finally, the plan would run afoul of various provisions of MRPC 8.4, which provides that it is misconduct for a lawyer to:

"(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such

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[3]Alteration of physician's reports was held to violate Louisiana MRPC 3.4(b) (prohibiting lawyers from falsifying evidence in *In re Watkins*, 656 So 2d 984 (la 1995).

[4]See ABA/BNA Lawyers Manual on Professional Conduct; 61:721 ("Courts uniformly apply Rule 3.4(c) to require compliance with court orders even though the text speaks of obeying 'rules.'"). See also, *Grievance Administrator v Stefani*, ADB 09-47-GA (March 2, 2010 Hearing Panel Report of Misconduct), at pp 23-25 (subpoenaing documents from non-party witness in violation of MCR 2.305(A)(5) and court's order constitutes violation of MRPC 3.4[c]). The panel's report is available at: http://www.adbmich.org/statuts/STEFANI_09-47-GA.PDF

[5]See *Meier v Meier*, 835 So 2d 379 (Fla Dist Ct App 2003) (appellate court cited Florida Bar Rules 3.4(a), (c) and (d) in requiring lawyer to produce documents requested in discovery despite client's instruction to withhold them).

conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

"(c) engage in conduct that is prejudicial to the administration of justice".

As has been discussed above, falsifying evidence is generally a criminal offense.[6] The conduct here is also clearly dishonest.[7] Additionally, the proposed conduct would be prejudicial to the administration of justice.[8]

Thus, Associate may not alter the electronic document by removing the metadata from it.

It is also not permissible for Associate to return the document to the CEO so that he may alter it if the CEO's alteration would violate other law (such as a criminal statute or a discovery rule, which may be applicable to parties). MRPC 1.2(c) provides that: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client." Return of the document to the CEO might be deemed assistance in light of the fact that Partner and Associate are aware that the original in their possession will be altered if returned to the CEO.[9] Accordingly, Partner and

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[6]Compare, *In re Watkins*, 656 CO 2d 984 (LA 1995) (lawyer who altered physician reports regarding social security claimant violated not only 3.4(a) and (c) but also 8.4(b) (criminal conduct reflecting adversely on fitness) (c) (conduct that is dishonest, etc.) and (d) (conduct prejudicial to the administration of justice).

[7]See, e.g., *Florida Bar v Burkich-Burrell*, 659 SO 2d 1082 (FL 1995) (submission of false interrogatory answers violated Florida Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). Compare *In Re Sealed Appellant*, 194 F2d 666 (CA 5, 1999) (backdating stock certificate to avoid it being considered a fraudulent conveyance violated Louisiana Rule of Professional Conduct 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation".)

[8]*In re Watkins, supra*, n 6.

[9]See Michigan Ethics Opinion RI-345 (October 24, 2008), available at http://michbar.org/opinions/ethics/numbered_opinions/RI-345.htm

Associate must determine whether alteration of the electronic document would constitute a violation of law whether conducted by themselves or their client.

LawFirm must withdraw form representing GeneriCorp if the representation will result in violation of the Rules of Professional Conduct or other law. MCR 1.16(a)(1). Thus, if the client insists on alteration of the document by LawFirm (or Partner or Associate, it (they) must withdraw pursuant to MCR 1.16(a)(1) because carrying out this objective of the representation would violate at least the Rules of Professional Conduct discussed about (MRPC 3.4 and 8.4) and possibly criminal law. Also, if GeneriCorp insists on the return of the document and then provides LawFirm with a "corrected" document which does not contain the relevant metadata, LawFirm will have to withdraw under those circumstances as well if such alteration/spoliation is prohibited by criminal law in Michigan (as the comment to MRPC 3.4 suggests). MRPC 1.2(c); MRPC 1.16(a)(1). Continued representation after facilitating the alteration of evidence would not be allowed under MRPC 1.16.

If the plan is carried out, both Partner and Associate will have committed misconduct. Because Partner has direct supervisory authority over Associate, Partner is required to make reasonable efforts to ensure that Associate conforms to the Rules of Professional Conduct. MRPC 5.1(b). That obligation would not be met if the plan is carried out. In fact, because Partner ordered Associate to alter or facilitate the alteration of the document, Partner would be responsible for Associate's violation of the rules. MRPC 5.1(c)(1). The Rules of Professional Conduct bind a lawyer even when he is following orders. MRPC 5.2(a). Associate, as a subordinate lawyer, would escape responsibility for violating the rules of professional conduct only if Associate acts in accordance with his supervisory lawyer's (Partner's) reasonable resolution of an arguable question of professional duty. MRPC 5.2(b). On these facts, including Associate's familiarity with sanctions decisions, the question does not appear arguable and the resolution does not seem reasonable.

ANSWER TO QUESTION NO. 6

"Other Acts" evidence is admissible per MRE 404(b)(1):

MRE 404(b)(1) provides:

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or assisting in doing an act, knowledge, identity or absence of a mistake or accident when the same was material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

As the Michigan Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000):

"404(b)(1) does not require the exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b)(1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting the *use* of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. This list is not, however, exhaustive." (Emphasis in original).

Evidentiary safeguards employed when admitting "Other Acts" evidence:

The state has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose in the non-exclusive list contained in MRE 404(b)(1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or

criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010). (Emphasis in original).

For "other acts" evidence to be admissible, the state has the burden of establishing that the evidence: (1) is offered for a proper purpose (not propensity) within MRE 401; (2) is relevant under MRE 402 to an issue or fact of consequence at trial under MRE 401; and (3) the danger of unfair (undue) prejudice does not substantially outweigh the probative value of the evidence under MRE 403 in view of the availability of other means of proof and other facts. A limiting instruction by the court can be given upon request under MRE 105.

The state must establish a proper purpose for the admission of the evidence within MRE 401:

The state argues that the "other acts" evidence is admissible to show Dan's scheme, plan or system in doing an act and absence of mistake or accident. Since the grounds articulated by the prosecution establish a permissible purpose for admission, the state's initial burden is satisfied and the next inquiry is whether the evidence is relevant to the theories identified by the prosecution.

The state must establish that the evidence is admissible under MRE 402:

The fact that the prosecution has identified a permissible theory of admissibility does not automatically render the "other acts" evidence relevant in a particular case. *Sabin* at 60. The trial court must determine "whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable then it would be without the evidence." *Id.*

Under the facts presented here, an examinee could appropriately conclude that the prior acts evidence will be deemed relevant under a theory that Dan had devised a plan which he used repeatedly to carry out separate but very similar crimes, wrongs or acts. Such acts of similar misconduct have been held by the Michigan Supreme Court to be logically relevant and admissible if the charged and uncharged acts are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme or system." *Sabin* at 63. With respect to the sailboat and house fires, the following facts support the prosecution's theory: (1) the first erupted immediately after Dan left the premises; (2) Dan's personal property was damaged and Dan sought and collected insurance proceeds; (3) the fires were started by a seemingly

careless act which any adult would recognize as a fire hazard; and (4) Dan was responsible for the act that caused the fire. The car engine fire, on the other hand, is sufficiently different from the other fires that it likely would not be deemed admissible under the theory of a common plan, scheme or system.

The evidence of all three prior fires could be found admissible to prove the absence of mistake under the theory known as the "doctrine of chances." "Under this theory, as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes." *People v Mardlin*, 487 Mich 609, 616 (2010) (emphasis in original). "If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance." *Id* at 617. See also *Crawford*, 458 Mich 367, 392-393. Here, an examinee could appropriately argue that the past fires are logically relevant to the objective probability that the fire now at issue was intentionally set since three prior fires involving Dan's property in the past five years is out-of-the-ordinary. Additionally, Dan benefitted from two of the three prior fires and was responsible for the acts, which Dan chalks up to carelessness, that started the fires. An examinee could also argue that the prior uncharged acts should not be admitted under the doctrine of chances because they are not similar to the charged act and Dan has not been involved in such incidents more frequently than the typical person.

The state must establish that the evidence is admissible under MRE 403:

Unfair prejudice is defined as the "danger that marginally probative evidence will be given undue or pre-emptive weight by a jury." *Crawford*, 458 Mich at 398. The court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence in view of other means of proof and other facts. Here, there is a potential for prejudice but the evidence of the prior fires (with the possible exception of the car engine fire) is probative in rebutting Dan's defense that the fire for which he is now being charged was an accident. It is also the only means of proof for the prosecution since the expert's report was inconclusive. Additionally, if the occurrence of the other fires is admitted, the jury can consider Dan's explanation for those events and give each incident whatever weight it deems appropriate. The defense can also require that the trial court

issue a limiting instruction to mitigate the potential for prejudice. While the prosecution likely has the stronger argument under MRE 403 for admission of the evidence at issue, an examinee could also argue--and deserve credit for--the opposite result.

ANSWER TO QUESTION NO. 7

A bailment is created when the owner of personal property (the bailor) delivers his or her property to the possession of another (the bailee) in trust for a specific lawful purpose. *In re George L. Nadell & Co*, 294 Mich 150, 154 (1940). Here, Vienna Victim and Oliver Owner entered into a bailment agreement whereby Vienna delivered her jewelry (bracelet and watch) to the possession of Oliver for repair and cleaning. Although the bailment temporarily transferred physical possession of the jewelry from Vienna to Oliver, a bailment does not alter the title of personalty. See *Dunlap v Gleason*, 16 Mich 158 (1867).

Vienna can recover her watch from Dan: MCL 600.2920 codifies the common law action for *replevin* and allows someone to recover specific personal property that has been "unlawfully taken or unlawfully detained," as long as the plaintiff has a right to possess the personalty taken or detained. MCL 600.2920(1)(c). Vienna remains the title owner of her watch because, as stated, a bailment does not change the title of personalty. Accordingly, even a good faith recipient of property (*i.e.*, Dan) lacks title to that property as against the rightful owner (Vienna). *Ward v Carey*, 200 Mich 217, 223 (1918).

An action for conversion against Dan, as someone buying stolen property, will not be successful, unless there is evidence that Dan knew that the bracelet was stolen. MCL 600.2919a(1)(b). No such evidence is present here, as the facts indicate an arms length business transaction between Dan and the burglar.

Vienna can recover monetary damages from Oliver for conversion of her bracelet: Under the common law, a bailee converted a bailor's property by using it in an unauthorized way and in defiance of the bailor's title in the property, for instance, by using the property himself, *Bates v Stansell*, 19 Mich 91 (1869). Michigan has codified the tort action of conversion at MCL 600.2919a, which allows the owner of personal property to recover "3 times the amount of actual damages sustained, plus costs and reasonable attorney fees" when another person "convert[s] property to the other person's own use." In this case, Oliver converted Vienna's bracelet to his own use, *i.e.* creating a gold ingot for sale to investors, and not for the intended purpose of the bailment. Vienna's actual damages from Oliver's conversion are $2,000, the appraised value of the bracelet. Accordingly, she will

be able to collect $6,000 in monetary damages from Oliver, the statutory award for treble damages, in addition to costs and attorney fees.

The availability of this remedy "in addition to any other right or remedy the person may have at law or otherwise," MCL 600.2919a(2), does not necessarily preclude an action to recover the property (*i.e.*, what was known under the common law as a replevin action), MCL 600.2920. However, where property sought to be recovered has been destroyed, a common law replevin action will not lie. *Gildas v Crosby*, 61 Mich 413 (1886). Oliver's destruction of the bracelet left Vienna with the sole remedy of a conversion action for monetary damages.

Vienna can likely recover monetary damages from Oliver in connection with her stolen watch: The obligations of a bailee depend on the nature of a particular bailment: whether the bailment is for the benefit of the bailee, for the benefit of the bailor, or for the mutual benefit of both parties. The nature of the bailment here was for the mutual benefit of both parties, because Oliver agreed to repair and clean Vienna's jewelry, and Vienna paid Oliver for this service. See *Godfrey v City of Flint*, 284 Mich 291 (1938). As the bailee in a bailment for the mutual benefit of both parties, Oliver is bound to exercise ordinary care of the subject matter of the bailment and is liable to Vienna if he fails to do so. *Id.* at 297-298.

The failure of a bailee to return the property subject to a bailment is prima facie evidence of negligence, and it becomes the bailee's burden to establish that his negligence was not the proximate cause of the bailor's damages. *Columbus Jack Corp v Swedish Crucible Steel Corp*, 393 Mich 478 (1975). "This may require a defendant-bailee to produce evidence of the actual circumstances surrounding the origins of the fire or the theft, including the precautions taken to prevent the loss." *Id.* at 486. The facts here provide strong evidence that Oliver was negligent in protecting Vienna's watch from the burglar: although Oliver had a state-of-the-art vault readily available to him, he failed to place Vienna's watch inside the vault for several nights in a row. Placing the watch inside the vault would likely have prevented the theft of the watch, since the items inside the vault were untouched. Such circumstances are likely to create a fact question for a jury to decide whether Oliver is liable to Dan for the loss. See *id.* at 486 n 3.

Although Vienna has the right to proceed to recover monetary damages for the theft of her watch, the extent of monetary damages that Oliver owes Vienna is affected by whether Vienna pursues an

action to recover the watch from Dan. By law, damages confined to the detention of personal property cannot be recovered twice. *Briggs v Milburn*, 40 Mich 512 (1879). Thus, if she elects to recover the watch from Dan, whatever monetary damages that Oliver owes Vienna are mitigated by the recovery of the watch. Nevertheless, Vienna may also be entitled to other damages reasonably foreseeable from Oliver's negligence. See *Solecki v Courtesy Ford, Inc*, 16 Mich App 691 (1969).

ANSWER TO QUESTION 8

Because the facts indicate that Dennis died without a testamentary document, Dennis's estate will be distributed according to the laws governing intestate succession, MCL 700.2101 *et seq.*

(1) Timmy Taylor: Where a decedent dies without a surviving spouse, as is the case here, the decedent's estate passes first to the decedent's descendants by representation. MCL 700.2103(a). Thus, if Timmy is Dennis's descendant, he will take the entire estate. However, the statutory definition of descendant contemplates "the relationship of parent and child," MCL 700.1103(k), and the statutory definition of "child" specifically excludes "a foster child." MCL 700.1103(f). Under the statutory scheme, Timmy cannot take Dennis's estate.

Michigan recognizes the doctrine of adoption by estoppel. See *Perry v Boyce*, 323 Mich 95 (1948). Under this equitable doctrine, a child is entitled to inherit as if he were adopted where a parent promises to adopt the child but does not. Because the facts do not indicate that Dennis ever promised to adopt Timmy, adoption by estoppel cannot be used as a basis to award Dennis's estate to Timmy.

(2) Ed Ermine: If the decedent has no surviving descendants, his estate next goes to "the decedent's parents equally if both survive or to the surviving parent." MCL 700.2103(b). As Dennis's mother did not survive him, Ed would take Dennis's entire estate if Ed were determined to be Dennis's parent.

Under Michigan law, where a child is born out of wedlock, a man may be considered a child's natural father for the purposes of intestate succession under one of the several circumstances listed in MCL 700.2114(1)(b)(i)-(v). Under subsection (v), a probate judge may determine that a man is a child's father "regardless of the child's age or whether or not the alleged father has died," using the standards contained in the Paternity Act, MCL 722.711 *et seq*, including DNA testing. MCL 722.716. Because the DNA results were conclusive, Ed Ermine is Dennis's "natural father" under the law.

This does not mean, however, that Ed is entitled to inherit from Dennis. MCL 700.2114(4) states that a natural parent is "precluded" from inheriting from a child "unless that natural

parent has openly treated the child as his or hers, and has not refused to support the child." Both prongs of the statute must be satisfied in order for Ed to take as Dennis's heir. *In re Turpening Estate*, 258 Mich App 464 (2003). If Scott's and Paul's testimony is credited, and the judge finds as fact that Ed neither visited nor supported Dennis during his childhood, there would be a sufficient basis to preclude Ed from inheriting Dennis's estate.

3. Paul and Scott: If the decedent has no surviving descendant or parent, then the decedent's estate passes to "the descendants of the decedent's parents or of either of them by representation." MCL 700.2103(c). Because Timmy does not qualify as a descendant, and Ed is precluded from taking as a natural parent, Paul and Scott would each take 50% of Dennis's $1,000,000 estate.

While Scott claims that Paul should take a smaller share of the estate because Paul and Dennis have only one parent in common, Michigan law specifically provides that "relative of the half blood inherits the same share he or she would inherit if he or she were of the whole blood." MCL 700.2107. Thus, Scott's claim would fail, and the brothers would share equally in Dennis's estate.

ANSWER TO QUESTION NO. 9

In Michigan, landlords have a general duty to keep residential premises in a habitable condition. This is commonly known as the implied warranty of habitability, and represents a duty imposed on all residential leases. In every lease, the lessor covenants that "the premises and all common areas are fit for the use intended by the parties" and that he will "keep the premises in reasonable repair during the term of the lease or license, and [will] comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located." MCL 554.139. These provisions generally require that the lessor provide premises that are reasonably suited for residential use, and is a change from the common law in which no general duty to provide habitable property existed. See generally, *Allison v AEW Capital Management LLP*, 481 Mich 419, 440-442 (2008) (Corrigan, J., concurring). Generally speaking, where the lessor breaches the warranty, a tenant may move out and terminate the lease, or may stay and sue for damages.

In the face of Michael's failure to take corrective action, the presence of substantial mold in a leased estate represents a serious health hazard that likely renders the estate untenantable or unfit for occupancy. Michael's outright refusal to correct this problem caused him to be in breach of the implied warranty of habitability. Indeed, the facts specifically note that the mold caused Julie to become sick and forced Nick to seek residence elsewhere during at least part of the relevant time period.

Michael v Julie: Where premises are rendered untenantable, Michigan statutory law provides that a lessee or occupant may "quit and surrender possession of the building, and of the land so injured, destroyed, or rendered untenantable or unfit for occupancy." MCL 554.201. A lessee who does so is "not liable to pay to the lessor or owner rent for the time subsequent to the surrender." MCL 554.201.

In this case, the presence of mold represented a serious health hazard in violation of local housing law and thus likely rendered Julie's apartment untenantable, particularly in light of Michael's refusal to rectify the problem. Because Michael breached the warranty of habitability, Julie therefore had the right to leave her apartment and surrender possession back to Michael. Furthermore, she is not liable for rent that would have been due after the time of surrender. Thus, Michael's action against Julie

alleging breach of their housing contract and claiming damages for unpaid rent should likely fail.

Michael v Nick: Nick's situation is slightly different from Julie's because, although he also had the right to terminate his lease and leave the premises, he decided to stay, withhold rent until Michael made the premises habitable, and notified health officials who could force Michael to take the necessary corrective measures.

The enactment of the comprehensive statutory scheme governing landlord-tenant law has been held to impose mutuality between the tenant's duty to pay rent and the landlord's duty to maintain the premises in habitable condition. A tenant is therefore allowed under this scheme to withhold rent payments when a landlord fails in this duty. *Rome v Walker*, 38 Mich App 458 (1972). Nick's withholding of rent for the time period in which it took Michael to return his apartment to a habitable condition thus does not provide legal grounds for eviction.

More important to this question, however, is the recognition that this fact pattern raises an issue of retaliatory eviction. In an action by a landlord to recover possession of realty, Michigan law provides to the tenant the defense of retaliatory eviction. MCL 600.5720. Statutory law specifically provides the situations in which the defense may be raised, including where the termination is intended as a penalty for a tenant's attempt to secure or enforce rights under the lease or the law, or where the termination is intended as a penalty for the tenant's "complaint to a governmental authority with a report of [the landlord's] violation of a health or safety code or ordinance." MCL 600.5720(1)(a), (b); see also *Frenchtown Villa v Meadors*, 117 Mich App 683 (1982).

Moreover, there exists a rebuttable presumption in favor of the defense of retaliatory eviction if the tenant shows that, within 90 days before the commencement of summary proceedings seeking eviction, he attempted to secure or enforce rights against the landlord or to complain against the landlord by action in a court or through a governmental agency. A landlord may rebut the presumption if he establishes by a preponderance of the evidence that the termination was not in retaliation for such acts. MCL 600.5720(2).

Since Nick wishes to remain in possession of his apartment during the fixed period of his remaining tenancy, he can raise the defense of retaliatory eviction in the eviction proceedings. Nick successfully complained to a local health authority regarding Michael's refusal to correct a serious health condition on the

premises, thereby enforcing his rights under state law and local housing code. Moreover, the fact that Nick did so within 90 days prior to the eviction proceeding will allow him to take advantage of the presumption that the attempted termination of the tenancy was a penalty, retribution, or otherwise in retaliation for Nick's decision to exercise his rights. As noted above, Nick's refusal to pay rent during the time in which Michael was in breach of his duty of habitability was a lawful action. And although Michael also alleges that several other residents have complained that Nick throws loud parties, Michael will have to establish by a preponderance of the evidence that this is the actual, good faith reason that Michael is seeking to terminate Nick's tenancy. Because those claims appear from the facts to be largely unsubstantiated, it is likely that Nick will prevail.

ANSWER TO QUESTION NO. 10

1. **Reasonable Doubt**: Reasonable doubt is defined in CJI2d 3.2(3) as:

"A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that--a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case."

II. Armed Robbery:

A. Elements: To prove the charge of armed robbery (MCL 750.529 and 750.530) the prosecutor must establish each of the following four elements beyond a reasonable doubt.

1. The defendant used force or violence or assaulted or put the complainant in fear.

2. The defendant did so while he was in the course of committing a larceny. A "larceny" is the taking and moving of someone else's property or money with the intent to take it away from that person permanently.

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.

3. The complainant was present while defendant was in the course of committing the larceny.

4. That while in the course of committing the larceny the defendant:

a. Possessed a weapon designed to be dangerous and capable of causing death or serious injury; or

b. Possessed any other object capable of causing death or serious injury that the defendant used as a weapon; or

c. Possessed any object used or fashioned in a manner to

lead the person who was present to reasonably believe it was a dangerous weapon or,

d. Represented orally or otherwise that he was in possession of a weapon.

B. Discussion: The first element was fulfilled because Dan put Ronald Graham in fear when he announced he had a gun. The second element is fulfilled because Ronald was put in fear during the commission of a larceny. The larceny occurred when Dan took and moved Lynn Tracy's money from Ronald with the intent to keep it. Dan knowingly gave Lynn a lesser amount of money and kept the greater amount of money. Alternatively, Ronald was put in fear in Dan's flight after the larceny when he swung the stick at Ronald. The third element is satisfied because Ronald was present during the course of the larceny, and even though Ronald was not required to be either the owner or rightful possessor of the money, he had a superior interest in it because he possessed the money when it was taken by Dan. *People v Cabassa*, 249 Mich 543, 546-547 (1930); *People v Needham*, 8 Mich App 679, 684-685 (1967). The fourth element is also satisfied because Dan defendant orally represented to Ronald that he possessed a gun. It is alternately satisfied as Dan swung the stick at Ronald to effectuate his escape (flight) or to keep the stolen money.

III. Felonious Assault:

A. Elements: CJI 2d 17.9 (MCL 750.82) provides the state has the duty to prove each of the following elements beyond a reasonable doubt:

1. The defendant either attempted to commit a battery on the complainant or did an act that would cause a reasonable person to feel or apprehend an immediate battery. A battery is the forceful or violent touching of the person or something closely connected with the person.

2. The defendant intended to either injure the complainant or make the complainant reasonably fear an immediate battery.

3. At the time, the defendant had the ability to commit a battery, appeared to have the ability or thought he had the ability.

4. That the defendant committed the assault with a dangerous weapon. See *People v Jones*, 443 Mich 88, 100 (1993); *People v Avant*, 235 Mich App 499, 505 (1999).

In CJI 2d 17.10, a dangerous weapon is defined as:

1. A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.

2. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that it is likely to cause serious physical injury or death, it is a dangerous weapon.

The prosecutor has the burden of proving that the weapon was dangerous or an object was used or intended for use as a weapon. See *People v Goolsby*, 284 Mich 375 (1938); *People v Brown*, 406 Mich 215 (1979). Whether an object is a dangerous weapon under the circumstances of the case is a question for the fact finder. *People v Barkley*, 151 Mich App 234 (1986), *People v Jolly*, 442 Mich 458 (1993).

B. Discussion: Dan can be convicted of felonious assault for attempting to strike Ronald with a large tree branch.

The first element is fulfilled because the defendant attempted to commit a battery by swinging the tree branch at Ronald. It could also be established because Ronald was in immediate fear of a battery as the tree branch was swung at him, causing him to quickly step back. The second element is fulfilled because Dan specifically intended to swing the branch at Ronald, *i.e.* "Get away from me." The third element is fulfilled because Dan had the ability to commit the battery because he possessed and swung the tree branch. Fourth, the defendant committed the assault with a large tree branch. Although an argument can be made that a tree branch does not constitute a dangerous weapon within the statute, the better argument is that because it can cause serious physical injury or death, it qualifies as a dangerous weapon. See *People v McCadney*, 111 Mich App 545, 549-550 (1981) (holding that a stick can be a dangerous weapon).

ANSWER TO QUESTION NO. 11

This question seeks to have the applicant identify the law governing searches by school officials and reliance on anonymous tips, and then to discuss whether there existed a "reasonable suspicion" sufficient to justify the search of Grassmeyer's truck and the admission of the evidence discovered during the search.

Both the federal and state constitutions guarantee the right to be secure from unreasonable searches and seizures. *People v Smith*, 420 Mich 1, 18-19 (1984), quoting Const 1963, art 1, §11 and US Const, Am IV. The applicant should recognize that the Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment to the United States Constitution, which is incorporated against the states under the due process clause of the Fourteenth Amendment. *People v Levine*, 461 Mich 172, 178 (1999). See also *Mapp v Ohio*, 367 US 643 (1961). Evidence obtained in violation of the Fourth Amendment is subject to suppression in state court. *People v Cartwright*, 454 Mich 550, 557-558 (1997).

As a preliminary matter, the applicant should address the presence of the liaison officer during the search. Although the Fourth Amendment generally requires police to obtain a warrant before conducting a search, police may search a vehicle without a warrant if there is probable cause to believe the vehicle contains evidence of a crime or contraband. *Pennsylvania v Labron*, 528 US 938, 940 (1996); *People v Garvin*, 235 Mich App 90, 102 (1999). Here, although there is no evidence of probable cause, the fact that the officer was present (and even forwarded the tip to the principal) had no effect on the search's validity as the officer did not initiate or even participate in the search. *People v Perreault*, 486 Mich 914 (2010); see, also, *Shade v City of Farmington*, 309 F3d 1054, 1060 (CA 8, 20902) (search constitutional "where school officials, not law enforcement officers, initiated the investigation and the search").

Unlike police officers, school officials need only a "reasonable suspicion" of an infraction of school disciplinary rules or a violation of the law when searching a student or his property (including a vehicle) on school grounds. *Perreault*, 486 Mich at 915 (Markman, J., concurring), quoting *New Jersey v TLO*, 469 US 325, 341-342 (1985); *People v Kazmierczak*, 461 Mich 411, 418-419 (2000). A "reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less

than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98 (1996), citing *United States v Sokolow*, 490 US 1 (1989).

The impetus behind the principal's search was an anonymous tip. Whether this tip was sufficient to constitute a reasonable suspicion depends on "the *totality of the circumstances* with a view to the question whether the tip carries with it *sufficient indicia of reliability* to support a *reasonable suspicion* of criminal activity." *People v Faucett*, 442 Mich 153, 169 (1993) (emphasis in original). A sufficiently detailed anonymous tip may provide a reasonable suspicion, especially where corroborating circumstances outside the tip are present. *Id.* at 170-172.

Arguably, the tip here was sufficiently reliable to support a reasonable suspicion. It identified four students whom the tipster had personally seen selling drugs on school grounds. The tipster was personally involved in the drug activity with one of these students (Weeden). Although greater detail was provided about Weeden and the search of his vehicle yielded no contraband, the tipster had also provided identifying details about the other students, including their names, grades at school, the vehicles they drove, and the types of drugs they sold. As for Grassmeyer, the tip additionally specified Grassmeyer's race and where he would sell drugs. Moreover, the corroborating circumstances concerning Grassmeyer pointed to the tipster's reliability. Specifically, the liaison-officer verified the students' vehicles, and additionally, the principal was aware before receiving the tip that Grassmeyer drove a truck and that he had been previously associated with drug activity. *People v Perreault*, 287 Mich App 168, 180-181 (2010) (O'Connell, J., dissenting), rev'd for reasons stated in Court of Appeals dissenting opinion, 486 Mich 914 (2010).

This information, taken as a whole, was sufficient to create a reasonable and particularized suspicion that Grassmeyer was selling drugs from the school parking lot. It was not based on a hunch and corroborating circumstances existed. Therefore, the search was reasonable under the Fourth Amendment and the circuit court should deny Grassmeyer's motion.

ANSWER TO QUESTION NO. 12

Mr. McGuire's Motion: It is well-settled that the Constitution only restricts the government, not private actors. *Rendell-Baler v Kohn*, 457 US 8340, 837 (1982); *Public Utilities Comm v Pollak*, 343 US 451, 461 (1972); *Behagen v Amateur Basketball Assoc*, 885 F2d 524, 530 (CA 10, 1989). Consequently, Smith cannot maintain a claim against Mr. McGuire because he was not a government employee or volunteer. There is also no evidence that he was acting on behalf of the school or Mrs. Lady, or that there was any nexus or joint action between the two actors, *Behagen, supra*. Instead, the facts show only that he acted in reaction to a negative statement being made about his son. Since the Constitution does not restrict a private individual's actions, Smith cannot state a First Amendment claim against Mr. McGuire.

Mrs. Lady's Motion: The second question pertains to Mrs. Lady and whether school officials can prevent a student at a school sponsored event from displaying a message that could be interpreted as support for drug use. The First Amendment to the U.S. Constitution prohibits the government from infringing on the freedom of speech. However, in the school context, an initial principle to recognize is that although students do not shed their constitutional rights at the schoolhouse gate, *Tinker v Des Moines Ind Comm Schools*, 393 US 503, 506 (1969), students do not have constitutional rights consistent with adults in other settings. *Bethel School Dist No 403 v Fraser*, 478 US 675, 682 (1986). School officials retain the right to exercise authority consistent with constitutional safeguards to prescribe and control conduct in the schools. *Tinker*, 393 US at 507. Thus, the "rights of students 'must be applied in light of the special characteristics of the school environment.'" *Morse v Frederick*, 551 US 393, 397 (2007), quoting *Hazelwood School District v Kuhlmeiner*, 484 US 260, 266 (1988).

Here, under the foregoing case law, and particularly *Morse*, the best argument is that Mrs. Lady did not violate Smith's free speech rights under the First Amendment, so the court should grant her motion. First, there is no dispute under the facts that there was a school policy against advocating drug use, and the school is empowered to enforce such rules. Although the statement on the picket sign is somewhat ambiguous, it can reasonably be considered a statement advocating drug use, for it states that steroids are "the breakfast of champions." See *Morse*, 551 US at 401-402 ("Bong

Hits 4 Jesus" sign found to be advocacy for drug use). Mrs. Lady immediately considered it a violation of school policy, and Smith was concerned that it might be. Hence, the best conclusion is that the sign violated school policy.

Second, the school policy did not violate Smith's limited right to free speech. The school had the authority to enforce its rules at a school function, which this home football game surely was. The school also had an interest in stopping student drug use, a compelling interest of the school. Furthermore, the message made a serious allegation against a student from another high school, which in fact caused the initial disruption in the stands. *Defoe v Spiva*, 625 F3d 324, 340 (CA 6, 2010) (Rogers J., concurring) (noting that disruption is not required, but even threat of disruption goes beyond the abstract desires in *Tinker*). Those interests, coupled with the student's limited free speech rights, suffice to preclude Smith from establishing a First Amendment violation against Mrs. Lady. Additionally, it did not involve political speech which is at the core of First Amendment protections, as it was not displayed or being utilized in a debate on the use of drugs in sports, or other such political debate.

ANSWER TO QUESTION NO. 13

The transaction falls under Article 2 of the Uniform Commercial Code (UCC), which governs contracts, whether oral or written, that involve the sale of goods. See MCL 440.2102. The contract involved the purchase of a stone statue, an item movable at the time identified in the contract for sale. MCL 440.2105(1). Here, there was a contract. The parties' discussion in regard to the subject matter, the quantity and the price showed sufficient agreement to establish a contract. MCL 440.2204. The contract was also recognized through Stella's execution of an invoice even though the price did not match the agreement. A contract for sale "does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." MCL 440.2204(3).

The next question is whether the contract is enforceable. The refusal to recognize the contract implicates the statute of frauds. MCL 440.2201, entitled "[f]ormal requirements; statute of frauds" provides in relevant part that:

"(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of $1,000.00 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the writing."

As mentioned, the invoice is a writing sufficient to indicate that a contract for sale has been made between the parties. From the invoice and its envelope receipt we can identify the parties, Stella and Brenda, and that the contract involved one statue priced at $1,400.

The significant question is whether there is sufficient evidence that the writing was "signed by the party against whom enforcement is sought," or Stella. MCL 440.1201(39) provides that "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing, including a carbon copy of his or her signature. Here, there is at least a question of fact in regard to whether Stella signed the invoice. There is some authority suggesting that letterhead alone in some

circumstances meets the "signed" criteria. Here, the invoice was on letterhead and Stella's hand printed notations specify that the essential terms of the contract, and it was sent to Brenda's address. There is persuasive evidence that the invoice reflected an overall intention to authenticate the contract. Thus, the contract is enforceable.

Some test takers may note that there was no objection within ten days as required by the statute of frauds. However, this requirement applies "[b]etween merchants," and there is no indication that Brenda is a merchant.

Last is the question whether either Stella is in breach of contract for failing to deliver the statue, or Brenda is in breach for failing to remit payment. The parties' contract did not address which party bore the risk of loss during transit. Accordingly, a gap filler provision of the UCC is applicable, MCL 440.2509, which provides in part:

"(1) Where the contract requires or authorizes the seller to ship the goods by carrier

"(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (section 2505); but

"(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery."

Here, the contract "authorizes" Stella to ship the statue, MCL 440.2509(1), but she was not "required" to deliver the statue to a particular location. MCL 440.2509(1)(a). Stella informed Brenda that customers typically pick up the statues but that she would hold onto the statue. Stella also mentioned that she would ask people that stopped by if anyone would kindly drop off the statue at Brenda's home. This statement did not oblige Stella to deliver the goods to Brenda or bear the risk of loss for the goods while in transit.

Moreover, under Article 2 of the UCC, "the 'shipment' contract is regarded as the normal one and the 'destination' contract as the variant type." *Eberhard Mfg Co v Brown*, 61 Mich App 268, 271 (1975). Further, "[t]he seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties

contemplates such delivery. *Id.* citing MCL 440.2503 (Official UCC Comment 5). Under Michigan law, "a contract which contains neither an F.O.B. term nor any other term explicitly allocating loss is a shipment contract." Here, the risk of loss passed to Brenda when the goods were duly delivered to Stella's brother. Accordingly, Brenda is in breach of contract and liable for $1,400.

Some test takers may alternately conclude that the risk of loss had not passed to Brenda because Stella is a merchant and Stella's brother was not a "carrier," *i.e.*, professional transportation service, under the Code. Though not supported by legal authority, this conclusion is arguable and may reflect positively on a test taker's application and reasoning in regard to this issue.

ANSWER TO QUESTION 14

1. Tom's claim regarding the parties' postnuptial agreement: Tom is wrong. Postnuptial agreements between the parties who intend to live together as man and wife are unenforceable in the event of divorce. *Wright v Wright* 279 Mich App 291 (2008). But agreements signed in contemplation of separation or divorce are enforceable, and in fact are favored because they further the public policy of settlement over litigation. *In re Berner*, 217 Mich 612 (1922); *Lentz v Lentz*, 271 Mich App 465 (2006). Postnuptial agreements are subject to the traditional standards for contracting under which they are enforceable absent fraud, duress, or mistake. *Id.* at 473-474, 478.

There is no indication of fraud, duress or mistake in the facts presented by the question. At most, Tom might argue that Mary's concealment of her affair constituted some type of fraud. Note, however, that at the time Tom released his interest in the home, its value was equal to the amount owed on the mortgage, so he would not be entitled to the return of his $5,000 investment even if the postnuptial agreement was invalid (both he and Mary essentially lost the value of their investment.)

2. Tom's claim regarding Mary's fault for the divorce and the disparity in income: The distribution of property in a divorce is controlled by statute. MCL 552.1 *et seq.* The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. *Berger v Berger*, 277 Mich App 700, 716-717 (2008). In dividing the marital property, the trial court must review the relevant property-division factors set forth in *Sparks v Sparks*, 440 Mich 141, 159-160 (1992): (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case, and the determination of relevant factors will vary depending on the facts and circumstances of the case. *Id.*

A circumstance "to be considered in the determination of

property division is the fault or misconduct of a party." *Davey v Davey*, 106 Mich App 579, 581-582 (1981). However, "the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Sparks*, 440 Mich at 158. In dividing the marital estate, the goal is to achieve equity, not to punish one of the parties. *Sands v Sands*, 442 Mich 30, 36-37 (1993).

Tom is therefore correct that Mary's affair and the disparity in income might make a difference in the distribution of the parties' marital assets, but in this case, any deviation from the standard 50/50 split would likely be minimal. The parties are relatively young and their marriage was not long term, there is not a great disparity in the value of their separate property, and even if their earning abilities differ, Tom can support himself without help from Mary. There is no clear answer to the question of the degree to which any deviation from the presumptive equal division of marital assets would be warranted, but the test taker should be able to apply the applicable property division factors to the facts presented in the question.

Note that this question *does not* call for an analysis of when *separate* assets (as opposed to *marital* assets) may be invaded. Examinees may note that a spouse's separate assets can be subject to division under two statutorily created exceptions: (1) when the property awarded to one party is not sufficient for the suitable support of one party or the party's children (MCL 552.23), or when one party contributed to the acquisition, improvement or accumulation of the property (MCL 552.401). Since Tom has not asked for a share of Mary's separate property, these statutes are not applicable.

3. <u>Mary's claim regarding the inheritance</u>: When a trial court divides property in a divorce proceeding, it must first determine what property is marital and what property is separate. *Reeves v Reeves*, 226 Mich App 490, 493-494 (1997). Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183 (2002). The first question here is whether the property is separate or marital. A court would almost certainly find it was separate because it was an inheritance. "[P]roperty received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 584-585 (1999). Note that putting a spouse's name on property does not render it marital property as opposed to separate property. *Reeves, supra*.

Separate assets, however, may become marital property when they are commingled with marital assets and the parties treated such assets as marital property. *Pickering v Pickering*, 268 Mich App 1, 12-13 (2005). Here, the funds were not intermingled with the parties' marital funds. The money was not put into the family checking account to pay general bills, but instead was segregated in a separate investment account that remained segregated throughout the marriage. The only use of the inheritance was to pay for Tom's car, which could arguably be considered a marital obligation, but the fact that only Tom's car was paid off suggests that Tom intended to keep the inheritance separate.

With respect to the interest earned on the CD during the parties' marriage, "[T]he appreciation of an actively managed account during the parties' marriage is marital property." *Maher v Maher*, 488 Mich 874 (2010); *Dart v Dart*, 460 Mich 573 (1999). Here the account was not actively managed, so the interest did not become marital property. Mary does not have a good claim for the CD or the interest earned on the CD during the marriage.

ANSWER TO QUESTION 15

The injury itself is unquestionably one "arising out of and in the course of" work. MCL 418.301(1). It arose from a risk at the workplace and on employer premises. *E.g. Ruthruff v Tower Holding Corp (On Reconsideration)*, 261 Mich App 613 (2004). While this might be noted by the examinee, resolution of the questions turns on the following analysis.

(1) ABC does not have any workers' compensation liability to Brandon. The reason is that Brandon would not be considered an "employee" as defined under the Workers' Disability Compensation Act (Act). Only "employees" are entitled to collect workers' compensation benefits. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 564 (1999). The Act defines "an "employee" as every person in the service of another "under any contract of hire, expressed or implied." MCL 418.161(1). The Supreme Court has explained that the "of hire" aspect of this phrase means the worker must be receiving "payment intended as wages, *i.e.*, real palpable, and substantial consideration." *Hoste*, 459 Mich at 576. *Hoste's* rational is that Michigan's workers' compensation system "provide[s] benefits to those who have lost a source of income. It does not provide benefits to those who can no longer take advantage of a gratuity or privilege that serves merely as an accommodation." *Id.* at 575. In the *Hoste* case itself, a ski patroller for Shanty Creek was injured. He had received from Shanty Creek "privileges of free skiing, complementary hot beverages, and meal discounts" in exchange for his patrol services. *Id.* at 577. That consideration was not deemed substantial enough to be considered "payment intended as wages." *Id.* at 575. Therefore, benefits were denied because he was not deemed an employee.

Here ABC's pizza, soft drinks, and Detroit Tigers baseball game tickets would similarly be viewed as a gratuity rather than "payment intended as wages." And, Brandon did not "los[e] a source of income. He would not be considered an "employee" of ABC and, therefore, he is ineligible for workers' compensation. The examinee might note this leaves Brandon free to consider a civil action against ABC, since the Act's "exclusive remedy" provision would be inapplicable. The exclusive remedy provision only shields employers from civil actions brought by an "employee." MCL 418.131(1).

(2) ABC's position on weekly wage loss benefits to Joe is less certain. In order to prove an entitlement to weekly wage loss

benefits, Joe needs to demonstrate that his injury constitutes a "disability, as that term is defined in MCL 418.301(4) of the Act. The Supreme Court has explained that the inability to return to one's last job is, generally speaking, not enough to prove disability. *Stokes v Chrysler, LLC*, 481 Mich 266, 281-283 (2008); *Sington v Chrysler Corp*, 467 Mich 144, 161 and 156-157 (2002). Instead, the employee must demonstrate an inability to perform "all jobs within his qualifications and training" at his maximum earning capacity; that requires employee to offer proofs on "the proper array of alternative available jobs" suitable to their qualifications and training. *Stokes*, 481 Mich at 283. These requirements contemplate proofs speaking to the employee's "full range of available employment options," not just the inability to perform prior jobs. *Id.* at 282.

Here Joe's inability to perform his ABC job due to his inability to stand for eight hours would not necessarily preclude him from doing other work, such as sedentary work. Given that he is a college graduate and has experience negotiating with sales agents, there is arguably other work suitable to his qualifications and training that would not demand standing for eight hours per day. Therefore, depending on what other available work might be suitable to Joe's qualifications and training, he may or may not be eligible for weekly benefits. The examinee should demonstrate recognition of the need to prove more than just the inability to return to one's last job.